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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court previously granted petitions for certiorari to review the Eighth Circuit's earlier decision in this case that, *inter alia*, the Federal Communications Commission ("FCC") lacks "jurisdiction" under §§ 251 and 252 of the Communications Act to adopt regulations interpreting federal statutory pricing requirements that will bind state utility commissions when they arbitrate the terms of the interconnection arrangements that allow new entrants to provide competing *local* telephone services. This petition seeks review of the Eighth Circuit's subsequent issuance of a writ of mandamus and decision holding, on the authority of its prior decision, that the FCC also lacks jurisdiction under § 271 of the Act to apply its interpretation of the federal statutory pricing and public interest requirements when it rules on applications of Bell Companies to provide *long distance* services, and that the FCC must treat state pricing standards as conclusive in ruling on these applications. The question presented is:

Whether the Eighth Circuit properly precluded the FCC from determining whether a Bell Company's charges for access to facilities and services satisfy statutory and competitive standards in ruling on applications to provide long distance services, notwithstanding the explicit statutory directive that the FCC may authorize a Bell Company to provide long distance services only if the FCC "finds" (after giving substantial deference to the views of the Attorney General) that the Bell Company is imposing charges "in accordance with the [pricing] requirements" of §§ 251 and 252(d) of the Act and that the authorization is otherwise "consistent with the public interest, convenience, and necessity."

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in the Petitioners' Appendix, *AT&T Corp., et al.* v. *Iowa Utils. Bd., et al.*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3484 (U.S. Jan. 26, 1998) (No. 97-826), see Appendix A, 1a-4a, Appendix D, 73a-79a, and Appendix E, 92a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

America's Carriers Telecommunication Association ("ACTA") is a national association with over 200 members, the core membership of which is comprised of small- to mid-sized telecommunications carriers providing competitive long distance services on a regional and national basis. ACTA has not issued shares or debt securities to the public. ACTA does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Association for Local Telecommunications Services ("ALTS"), is a trade association comprised of companies which construct and operate local telecommunications networks and which use those networks to provide local telecommunications services in competition with incumbent local exchange carriers. ALTS does not have a parent company nor any non-wholly owned subsidiaries.

AT&T Corp. has no parent company. It has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd.
(Hong Kong).

AT&T owns an interest in the following nonpublicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

Cable & Wireless, Inc. is a privately held corporation, a wholly owned subsidiary of Cable and Wireless Holdings, Inc., which, in turn, is a wholly owned subsidiary of Cable and Wireless plc, a publicly traded company. Cable and Wireless plc holds a partial interest in the following subsidiaries and associated undertakings: Hong Kong Telecommunications Limited; Asia Satellite Telecommunications Holdings Ltd.; Cable & Wireless Communications plc; PLD Telecom Inc.; Bezeq - The Israel Telecoms Corporation Limited.

Competitive Telecommunications Association ("CompTel") is an industry association representing the nation's competitive telecommunications carriers, with over 200 members. CompTel has not issued securities to the public, and it does not have any publicly owned parents, subsidiaries, or affiliates.

Cox Communications, Inc. has issued shares and/or debt securities to the public. Cox Enterprises, Inc. holds a

controlling interest in Cox Communications, Inc. and also holds a controlling interest in Cox Radio, Inc., which has issued shares and/or debt securities to the public. Cox Communications, Inc. also has a non-controlling interest, indirectly through intermediaries, in each of the following entities which have issued shares and/or debt securities to the public: At Home Corporation, Flextech PLC, Gemstar, Sprint Spectrum L.P., Sprint Spectrum Finance Corporation, Syntellect, Teleport Communications Group, Inc. and TeleWest PLC.

Excel Telecommunications, Inc. ("Excel") is a wholly owned subsidiary of Excel Telephone, Inc., which, in turn, is wholly owned by Excel Communications, Inc., a publicly traded company. Excel has no nonwholly owned subsidiaries.

General Communications, Inc. ("GCI") is a publicly traded corporation. GCI, Inc., a wholly owned subsidiary of GCI, is an issuer of publicly traded debt securities. MCI owns 19.3% of the equity of GCI and Kearns-Tribune, Corporation owns 0.9% of the equity of GCI.

MCI Telecommunications Corporation ("MCI") is a wholly owned subsidiary of MCI Communications Corporation. MCI has the following nonwholly owned subsidiaries: General Communications, Inc.; IFP Holdings, Inc.; ICS Communications, Inc.; Digital Network Television, Inc.; Genesys Telecommunications, Inc.; Inflight Phone Corp.; Multimedia Medical Systems, Inc.; News T Investments, Inc.; News Triangle Finance, Inc.; Pioneer Holding L.L.C.; and Security Technologies, Inc.

The National Cable Television Association, Inc. ("NCTA") is the principal trade association of the cable television industry in the United States, representing the interest of owners and operators of cable television systems serving over 80 percent of the nation's cable households. Its members also include cable programmers, cable equipment manufacturers and others interested in, or affiliated with, the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 29.

Sprint Corporation has no parent companies. Its only nonwholly owned subsidiary is Central Telephone Company (which in turn has wholly owned subsidiaries).

Telecommunications Resellers Association ("TRA") is an incorporated trade association representing over 650 resale carriers and their underlying product and service providers. TRA has no parent companies or subsidiaries.

WorldCom, Inc. ("WorldCom"), a Georgia corporation, is organized for the purpose of engaging in telecommunications and related businesses. WorldCom common stock is traded on The Nasdaq National Market ("NASDAQ") under the symbol "WCOM", and its depositary shares also are traded on NASDAQ under the symbol "WCOMP". On December 31, 1996, a wholly owned subsidiary of WorldCom merged with MFS Communications, Inc. ("MDFA"), a Delaware Corporation. MFS previously was publicly traded on NASDAQ under the symbol "MFST", and its depositary shares were traded on NASDAQ under the symbol "MFSTP". As of March 13, 1998, WorldCom has no parent company or nonwholly owned subsidiary companies.

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The opinion of the Eighth Circuit reviewing the FCC's *First Report and Order*, as amended by the court's order on rehearing, is reported at 120 F.3d 753. The opinion of the Eighth Circuit reviewing the FCC's *Second Report and Order* is reported at 124 F.3d 934. The Eighth Circuit's Writ of Mandamus and its Order on Motions for Enforcement of the Mandate are not yet reported. *See* App. 1a-20a.[1] The FCC's *First Report and Order* and its *Second Report and Order* in its local competition rulemaking are reported at 11 F.C.C.R. 15499 (1996) and 11 F.C.C.R. 19392 (1996), respectively. The FCC's decision in *Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 1997 WL 522784, CC Docket No. 97-137 (Aug. 19, 1997) ("*Ameritech Order*") is unreported. See App. 21a-34a.

JURISDICTION

The writ of mandamus and the order on motions for enforcement of the mandate were entered on January 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Telecommunications Act of 1996 are reproduced in Appendix C.

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[1] "App." refers to the appendix to the petition for a writ of certiorari in *Federal Communications Commission, et al.* v. *Iowa Utilities Board, et al.*, which seeks review of the same judgment as this petition.

STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), was enacted to promote and protect competition in all telecommunications markets. The Act enacts a new part of the Communications Act (47 U.S.C. §§ 251-61) that is designed rapidly to open monopoly local telephone markets to competition. In addition, and most pertinent here, it codifies the core provisions of the 1982 Antitrust Decree that broke up the former Bell System and that created and maintained a competitive long distance services market by excluding the divested Bell Operating Companies ("BOCs") so long as they possess bottleneck local telephone monopolies.

In particular, § 271(a) of the Act continues the Decree's prohibition on the BOCs' provision of long distance services. Further, § 271(b) authorizes the FCC to remove the restriction on individual BOCs only if the FCC first finds that the BOC has implemented the provisions of the 1996 Act that open its bottleneck local exchange monopolies to competition and also finds that the BOC's entry into the long distance market is otherwise in the public interest. Section 271 thus fosters the purposes of the 1996 Act by protecting the existing competition in today's long distance market and by giving the BOCs incentives to implement the arrangements that will end the local monopolies that apply to the major metropolitan areas and 80% of the nation's telephones. Petitioners in this case are representatives of long distance carriers and other new local entrants which will benefit from § 271's implementation.

Nothing is more important to the effectuation of the Act's dual purposes than the prices at which the BOCs allow competitors to obtain access to the local bottleneck facilities that the BOCs control. It will prevent the emergence of local competition -- and give illicit advantages to any BOC that

provides long distance service -- if competitors are required to pay prices for these facilities that exceed the economic costs that the BOCs incur when they use the facilities to offer their own services. Accordingly, the 1996 Act adopts new federal statutory pricing standards for access to these facilities. 47 U.S.C. §§ 251(c) & 252(d).

However, in its July 18, 1997 decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997), the Eighth Circuit held that the FCC does not have statutory authority under §§ 251 and 252 of the Act to adopt rules interpreting the federal statutory pricing requirements that will bind state utility commissions when they elect to arbitrate the terms of the interconnection arrangements that allow new entrants to provide competing local telephone services (hereafter, "Section 251 Decision"). The Eighth Circuit concluded that these federal statutory pricing requirements are to be enforced exclusively through after-the-fact review by federal district courts of the States' arbitration decisions. This Court granted certiorari to review that decision, and the case will likely be argued in October 1998. 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141).

In a second *Iowa Utilities Board* decision, issued January 22, 1998, of which this petition seeks review, the Eighth Circuit held that the FCC also lacks authority under § 271 to apply its interpretation of the federal statutory pricing requirements in determining whether BOCs will be permitted to enter the overwhelmingly *interstate* long distance market (hereafter "Section 271 Decision"). The Eighth Circuit further issued a writ of mandamus to the FCC requiring the FCC to treat as conclusive each state utility commission's interpretation and application of those federal requirements when reviewing a BOC application to provide long distance services originating in that State.

This decision has immense national importance. As a result of the judicial decree that broke up the Bell System and prevented the BOCs from entering the long distance market while they retained their bottleneck monopolies over local telephone service, the Bell System monopoly that formerly dominated long distance service in the United States was replaced with a fiercely competitive long distance market that now includes four national facilities-based carriers and hundreds of other regional facilities-based carriers and national resale carriers. Competition has provided long distance consumers with a vast array of new and innovative services and has resulted in long distance prices declining by more than 50%. In light of the importance to the nation of competition in this industry, this Court twice directly reviewed district court decisions under the 1982 Antitrust Decree on an expedited basis,[2] and the Court of Appeals for the D.C. Circuit issued numerous published opinions construing and enforcing its terms.[3]

The importance to competition of excluding the BOCs from the long distance market until they lose their local

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[2] *See Maryland v. United States*, 460 U.S. 1001 (1983) (mem.); *California v. United States*, 464 U.S. 1013 (1983) (mem).

[3] *See, e.g., United States v. Western Elec. Co.*, 46 F.3d 1198 (D.C. Cir. 1995); *id.*, 12 F.3d 225 (D.C. Cir. 1993); *id.*, 993 F.2d 1572 (D.C. Cir. 1993); *id.*, 969 F.2d 1231 (D.C. Cir. 1992); *id.*, 907 F.2d 1205 (D.C. Cir. 1990); *id.*, 907 F.2d 160 (D.C. Cir. 1990); *id.*, 900 F.2d 283 (D.C. Cir. 1990); *id.*, 894 F.2d 1387 (D.C. Cir. 1990); *id.*, 894 F.2d 430 (D.C. Cir. 1990); *id.*, 846 F.2d 1422 (D.C. Cir. 1988); *id.*, 797 F.2d 1082 (D.C. Cir. 1986).

monopolies has thus long been established as a matter of national policy. That principle is now codified in the 1996 Act as a central component of the nation's communications law in order to protect this competition and to promote competition in local services as well. The Eighth Circuit's Section 271 Decision, however, greatly threatens that critical national policy.

The Eighth Circuit premised its Section 271 Decision entirely upon the correctness of its Section 251 Decision. Accordingly, if this Court reverses the Section 251 Decision, that reversal will eliminate any basis for the Section 271 Decision, and the writ of mandamus will have to be vacated. This petition should, however, be granted rather than held, and scheduled to be argued and decided together with the Section 251 Decision to which it so closely relates. The two decisions were issued in the same case, and the Eighth Circuit believed that the Section 271 Decision merely implemented its earlier Section 251 Decision.

As we detail *infra*, even if the Eighth Circuit's Section 251 Decision were correct and this Court were to affirm it, the subsequent decision on § 271 would still be erroneous and should be reviewed and reversed. But if the Court holds this case and waits until it issues its decision on the § 251 issues before granting certiorari, that could create great difficulties for the FCC and the industry. Numerous § 271 applications are expected to be filed by BOCs over the next 12 months and the 1996 Act requires the FCC to decide each within 90 days of the date the application is filed. *See* 47 U.S.C. § 271(d)(3). That means that, if the § 271 issue is not decided at the same time as the § 251 issues, it likely would have to be addressed by the Court initially through emergency stay requests rather than full and orderly briefing. Moreover, because the issues are so closely related, the parties will be briefing much of the § 271 issue in their merits briefs on the Section 251 Decision in any

event. For all these reasons, the most efficient and logical way to review *Iowa Utilities Board* is to grant this petition and consider the entire case at one time.

1. *Local Telephone Monopolies and Pertinent Historic State and Federal Regulation.* Historically, local telephone services in the United States were provided by franchised local monopolists, which are known as incumbent local exchange carriers or LECs. The BOCs are the LECs that serve more than 80% of the nation's telephones and virtually all of the nation's major metropolitan areas, and that were, until January 1, 1984, affiliates of AT&T. In addition to providing local exchange services within local calling areas, the BOCs' local networks are essential facilities to which long distance carriers must have access in order to carry long distance calls between those calling areas. Thus, AT&T, MCI, Sprint, and other long distance carriers use BOC facilities to begin and terminate their long distance services. These are known as exchange access services.

Regulation of telephone service has always been divided between state and federal authorities. Prior to 1996, § 2(b) of the Communications Act (47 U.S.C. § 152(b)) generally left States with exclusive jurisdiction over purely intrastate communications services, so States regulated rates for local exchange services and intrastate long distance services. However, the FCC has always regulated interstate long distance services, including exchange access services for interstate long distance calls, under §§ 2(a) and 201-205 of the Communications Act. 47 U.S.C. §§ 152(a), 201-205.

Local telephone service has historically been considered a natural monopoly, *see United States v. Western Elec. Co.*, 673 F. Supp. 525, 538 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283, 289-92, 300-01 (D.C. Cir. 1990), and the FCC and

the States formerly prohibited competition with BOCs' local services. But the FCC sought to foster competition in the provision of interstate long distance services by imposing upon BOCs and their long distance affiliates a series of duties, including requirements that BOCs charge just, reasonable, and nondiscriminatory rates for exchange access services.

Because these FCC regulations were insufficient, the United States thereafter filed a suit under the Sherman Act against the Bell System, charging that the BOCs had used their local monopolies to favor their then-affiliate AT&T and to impede long distance competition. Many of the Justice Department's claims alleged anticompetitive pricing practices by the Bell System, such as engaging in "price squeezes" against long distance competitors by charging those competitors prices for exchange access services substantially in excess of their economic cost while permitting the Bell System's long distance affiliate to use those facilities at economic cost. *See United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1355, 1357, 1364-1370 (D.D.C. 1981). This suit was settled in 1982 when the Bell System consented to a Decree (the Modification of Final Judgment or "MFJ") that (1) required the divestiture of the BOCs, (2) precluded the BOCs from providing either interstate or intrastate long distance services so long as they had local monopolies and (3) required the BOCs to provide interstate and intrastate exchange access under nondiscriminatory terms and conditions at cost-based rates. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 140-43 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The premise of the MFJ was that any BOC that "enjoyed a monopoly on local calls would ineluctably leverage that bottleneck control in the interexchange (long distance) market" to harm long distance competition and consumers in a variety of

ways. *United States v. Western Elec. Co.*, 969 F.2d 1231, 1238 (D.C. Cir. 1992) (citation omitted). For example, a BOC could discriminate against long distance competitors in the pricing and provisioning of essential exchange access services, and could also monopolize the long distance business of those customers who desire to obtain local exchange services and long distance services from a single source ("one-stop shopping"). The federal court thus held that it was in the "public interest" to enjoin the BOCs from providing long distance services until such time as changes in technology or regulation were determined by the court to have "eliminate[d] the [BOCs'] local exchange monopoly" or otherwise deprived them of the ability to engage in this leveraging. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 194-95.

Over 30 States intervened and opposed entry of the MFJ on jurisdictional grounds. They asserted that because the MFJ's requirements applied not only to interstate services but also to intrastate services, the MFJ encroached upon the States' exclusive jurisdiction over intrastate telecommunications services under § 2(b) of the Communications Act. These States thus claimed both that the MFJ's requirements could not be implemented without their prior approval and that they would also have the authority to undo its requirements after entry of the decree by ordering BOCs to behave inconsistently with the MFJ's requirements with respect to intrastate services. The district court rejected these claims, holding that § 2(b) of the Communications Act was irrelevant because the court was acting under the Sherman Act, which is fully applicable to intrastate communications services because they affect interstate commerce. This Court affirmed. *See United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153-160 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

Under the MFJ, States continued to control whether and on what terms other carriers would be permitted to compete with the BOCs in the provision of intrastate exchange and exchange access services, and the FCC exercised similar authority over interstate access services. At the same time, federal courts, in deciding whether to authorize BOCs to provide long distance services under this standard, were required to determine the sufficiency of those state and federal regulations in establishing competitive and other safeguards that would prevent the harms that BOC entry into long distance would otherwise cause. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 544-546, 567-579 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283, 289-92, 300-01 (D.C. Cir. 1990). Because the issues arose under federal antitrust standards, courts gave substantial deference to the Department of Justice on these questions, but no deference to the views of the FCC or state regulators. *See United States v. Western Elec. Co.*, 900 F.2d at 297-98.

Moreover, even if a BOC had received authorization to provide long distance services from the court administering the MFJ, the BOC could not lawfully have provided interstate long distance services unless and until the FCC had issued a "certificate of public convenience and necessity" under § 214 of the Act. That certificate could not be issued unless the FCC found that BOC entry would be consistent with the public interest. The FCC was also authorized to impose conditions to assure protection of that interest. 47 U.S.C. §§ 214(a) & (c).

2. *The 1996 Act.* In the 1996 Act, Congress sought to transform the monopoly local telephone markets into competitive markets. To that end, Congress not only preempted all state-law barriers to entry (§ 253), but further imposed affirmative duties on the BOCs to allow new entrants

to use the BOCs' essential and other facilities at cost-based rates to provide competitive service. *See* §§ 251-252. The Act provides that a BOC must enter into detailed "interconnection agreements" with new entrants setting the prices and other terms and conditions under which the new entrants may interconnect with the BOC's network (§ 251(c)(2)), obtain access to the BOC's network elements (§ 251(c)(3)), and resell the BOC's services (§ 251(c)(4)). The Act further sets federal pricing standards governing the charges the BOCs may impose on new entrants pursuing each of these three modes of entry. The FCC was directed to adopt regulations implementing the 1996 Act's new requirements within six months of the Act's enactment (§ 251(d)(1)). Under the Act, state regulatory commissions may assume the task of applying those regulations and the statute's provisions to resolve disputes concerning the terms of these interconnection agreements (§ 252), in which case their decisions are reviewable in federal district courts (§ 252(e)(6)), or they may choose to leave that responsibility to the FCC (§ 252(e)(5)), in which case its decisions are reviewable in the court of appeals (§ 402(a)).

Congress also codified in the Act the core provision of the MFJ's long distance restrictions on BOCs by generally prohibiting a BOC from providing long distance services to customers in States where the BOC has a local exchange monopoly. 47 U.S.C. § 271(a). Section 271 further provides, however, that the FCC can grant a BOC this long distance authority for service originating in a particular State if the FCC makes four specific findings. Two are pertinent here: First, it must find that the BOC has fully implemented the items on the competitive checklist and opened the local market in that State to competition by providing to competitors, among other things, access to unbundled network elements, interconnection, and wholesale services for resale "in accordance with the requirements of sections 251(c)[] and 252(d)[]" of the Act. 47

U.S.C. §§ 271(d)(3)(A), (c)(2)(B)(i) & (c)(2)(B)(ii). Second, the FCC must "find" that the authorization is "consistent with the public interest, convenience and necessity." *Id.* § 271(d)(3)(C). With respect to each of these findings, the FCC is required to give "substantial weight" to the Justice Department's evaluation (*see* § 271(d)(2)(A)), but while it must "consult" with the pertinent state commission to "verify" whether the BOC is in compliance with the checklist, the Act includes no similar requirement of deference to the state commission (*see* § 271(d)(2)(B)). Moreover, unlike most FCC orders, which can be reviewed either by the D.C. Circuit or the circuit in which the petitioner resides, *id.* § 402(a), Congress provided that the D.C. Circuit, with its years of experience under the MFJ, would have exclusive jurisdiction over all FCC § 271 orders. *Id.* § 402(b)(6) & (9).

On August 8, 1996, the FCC issued its *First Report and Order*, adopting rules that implement the local competition provisions of the 1996 Act, including the pricing requirements that §§ 251 and 252 impose upon BOCs. First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996). The FCC determined that the price for interconnection and access to unbundled network elements should be based on "forward-looking" costs, also known as total element long-run incremental costs ("TELRIC"), rather than on the "embedded" costs reflected on ratemaking accounting books. *Id.*, ¶ 620. The FCC found that forward-looking costs are the costs the LECs themselves incur when they use these facilities to provide services, and that it would be anticompetitive for the LECs to charge their competitors under an "embedded cost" standard where such prices would be higher. *Id.*, ¶¶ 704-707. The FCC also specified other pricing rules for the resale of local services. *Id.*, ¶¶ 878-934.

The FCC held that these pricing and other rules would bind state commissions in establishing interconnection agreements. *Id.*, ¶¶ 111-117. Further, the FCC stated that because many of these rules constituted the FCC's interpretation of substantive requirements imposed by §§ 251 and 252 that had to be satisfied as part of the competitive checklist under § 271, these rules also established the FCC's views of the requirements of some items of that checklist and would "assist BOCs in determining what steps must be taken to meet [those] requirements." *Id.*, ¶ 57.

3. *The Eighth Circuit's Section 251 Decision.* Petitions for review of the *First Report and Order* were consolidated in the Eighth Circuit pursuant to 28 U.S.C. § 2112. The Eighth Circuit initially stayed and ultimately vacated the pricing rules that the FCC adopted to implement §§ 251 and 252.

The Eighth Circuit acknowledged that §§ 251 and 252 imposed federal pricing requirements that unambiguously apply to local telephone facilities and services that it found to be intrastate. But the Eighth Circuit concluded that §§ 251 and 252 did not give the FCC any authority to interpret or apply those requirements. Although other FCC regulations under those sections were determined to bind the States in arbitrations, the Eighth Circuit held that the "[p]lain [l]anguage" of §§ 251 and 252 gave the States and not the FCC authority to interpret the Act's pricing standards in arbitrations over interconnection agreements. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 794-796. The Eighth Circuit further held that, if the matter were ambiguous, § 2(b) would require that the issue of statutory authority be resolved in favor of the States and against the FCC because, it found, the interconnection agreements were intrastate matters. *Id.* at 796-800.

By contrast, the FCC's conclusion in the First Report and Order (¶ 57) that it has authority to interpret these requirements in § 271 proceedings was not challenged by either the BOCs or the state commissions before the Eighth Circuit. To the contrary, the BOCs expressly argued that the FCC would apply its interpretation of the federal statutory pricing requirements in § 271 proceedings even if it were held to lack this authority under §§ 251 and 252. In particular, it was on this basis that the BOCs argued that the Eighth Circuit would be required to review the substance of the FCC's pricing rules even if it held that there was no authority under §§ 251 and 252 to issue those rules. *See, e.g.*, BOC/GTE Brief to Eighth Circuit at 31. The Eighth Circuit did not address § 271 in its Section 251 Decision.

4. *The FCC's Ameritech Order*. On August 19, 1997, one month after the Eighth Circuit issued the Section 251 Decision, the FCC released its *Ameritech Order*. In that order, the FCC denied Ameritech's § 271 application for long distance authority in Michigan because Ameritech had failed to open its local exchange market to competition in compliance with the competitive checklist in at least three respects. But the FCC went on to provide guidance on other issues that had been raised, two of which are pertinent here.

First, the FCC stated that, in discharging its duty to determine whether a BOC is providing access and interconnection "in accordance with the [pricing] requirements of sections 251(c) and 252(d)," the FCC would apply its interpretation of those requirements unless and until they are construed differently by the federal courts. *Ameritech Order*, ¶¶ 284-85 (App. 24a-26a). In this regard, the FCC noted that the Eighth Circuit's Section 251 Decision did not review the merits of the FCC's pricing rules, and that the federal approach

to pricing had generally been adopted by the vast majority of States. *Id.* ¶ 283 (App. 23a-24a).

The FCC explained that the Act's requirement that BOCs charge cost-based prices for access to local facilities and services would ultimately have a "uniform meaning nationwide." *Id.*, ¶ 286 (App. 26a). Because of the Eighth Circuit's Section 251 Decision, however, the meaning of the statutory requirement of cost-based prices "will be determined through *de novo* review of State [commission] determinations by the federal district courts. . . . The Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means." *Id.*, ¶ 284. The FCC observed that while this issue "wends it[s] way through the courts" the Commission must necessarily rule on § 271 applications, and in doing so, has a statutory obligation to determine within 90 days whether a BOC seeking long distance authorization is providing access to local facilities and services at cost-based prices. *Id.*, ¶ 285. In fulfilling its obligation, therefore, the FCC determined that it would uniformly apply its interpretation of the pricing requirements in § 271 proceedings unless and until that interpretation is reversed by the federal courts.

Second, the FCC declared that, in any event, it had the authority and responsibility to consider BOCs' pricing practices and commitments in deciding whether granting long distance authority is "consistent with the public interest" under § 271(d)(3)(C). *Id.* ¶ 288 (App. 28a). It noted that the prices the BOCs charge new entrants in local exchange markets for essential facilities and services will profoundly affect whether their entry in the long distance market would harm competition, and thus defeat the public interest. *Id.* ¶ 287 (App. 27a) (local markets are not open to competition "if the prices for interconnection and unbundled elements do not permit efficient

entry. That would be the case, for example, if such prices included embedded costs").

5. *The Eighth Circuit's January 22, 1998 Decision and Writ of Mandamus.* After the FCC issued its denial of Ameritech's § 271 application in Michigan, state regulatory commissions and BOCs filed motions in the Eighth Circuit which asserted that the *Ameritech Order* constituted a violation of the court's mandate, and requested that the court issue a writ of mandamus. The FCC and its supporting intervenors opposed these motions on four grounds: First, the Eighth Circuit lacked jurisdiction to review the FCC's § 271 decision, because such review is within the exclusive jurisdiction of the D.C. Circuit under § 402(b) of the 1996 Act. Second, issuance of a writ of mandamus was entirely inappropriate because any party aggrieved by the *Ameritech Order* had an immediate right of appeal to the D. C. Circuit. Third, the court's Section 251 Decision did not address, much less decide, whether the FCC has statutory authority to adopt federal pricing rules under § 271 and that issue thus could not have been within the court's mandate. Fourth, even assuming *arguendo* that the FCC lacks authority to adopt federal pricing rules that bind state commissions in establishing the terms of interconnection agreements for local exchange facilities and services under §§ 251 and 252, the FCC plainly has authority to apply its interpretation of federal statutory pricing requirements in § 271 proceedings to grant authorization to provide long distance services that are overwhelmingly interstate.

The Eighth Circuit rejected these arguments. It stated that a "core holding[]" of its July 18, 1997 decision was that the FCC has no jurisdiction to issue pricing rules "for interconnection, unbundled access, resale, and transport and termination of local telecommunication services under section 252(d) of the [Act]." App. 4a. Despite the fact that the

Ameritech Order addressed a § 271 application for long distance authorization, the court concluded that the FCC's assertion that it would apply its interpretation of federal statutory pricing requirements in that distinct context "does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do." *Id.* at 8a. Finally, the court concluded that its issuance of an order forbidding the FCC to apply its interpretation of federal statutory pricing requirements in § 271 proceedings did not infringe upon the D.C. Circuit's exclusive jurisdiction to review the FCC's § 271 decisions. The court explained that it would "leave the FCC's Ameritech Order untouched," *id.* at 19a, apparently believing that if it only forbade the FCC from applying its interpretation of federal statutory pricing requirements in *future* § 271 proceedings, it was not intruding on the D.C. Circuit's domain.

6. *This Court Grants Certiorari.* In November 1997, the FCC and petitioners here filed a petition for certiorari seeking review of the Eighth Circuit's Section 251 Decision. This Court expedited its consideration of the petition for certiorari, and, on January 23, 1998, granted eight petitions for review of that decision.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S SECTION 271 DECISION INCORRECTLY DECIDED AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW.

The Section 271 Decision is of enormous significance. The BOCs have been barred for nearly two decades from providing long distance services to their local exchange customers while they retain their local exchange monopolies, and that prohibition has transformed the long distance industry

from a monopoly to a vigorously competitive market. Under the Eighth Circuit's decision, however, that historic progress could be reversed. Its decision could require the FCC to grant long distance authorization to BOCs which, in the FCC's judgment, charge new entrants anticompetitive prices for access to essential facilities and services that preclude local competition, that ensure the continuation of the BOCs' local monopolies, and that would enable the BOCs to use those monopolies to impede long distance competition.

The Eighth Circuit's decision is plainly wrong. As a threshold matter, the issuance of a writ of mandamus was both inappropriate and beyond the Eighth Circuit's jurisdiction.[4] On the merits, the decision is contrary to the terms and purposes of the 1996 Act.

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[4] The Communications Act vests exclusive jurisdiction over appeals of the FCC's § 271 decisions, including the *Ameritech Order*, in the D.C. Circuit. *See* 47 U.S.C. §§ 402(b)(6,9). It is settled law that (1) mandamus may not be issued where an adequate remedy is available through a normal appeal *(see, e.g., Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943)), and (2) the All Writs Act bars a court from issuing a writ of mandamus to an agency or court whose final decision is properly reviewable only in another circuit (*see* 16 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3932, at 476-7 (2d ed. 1996)). *See supra* p. 15. Further, the Eighth Circuit did not expressly or impliedly decide the separate issues arising under § 271 in the Section 251 Decision, and the parties to that case had all assumed that the FCC would exercise the precise authority that the Section 271 Decision erroneously concluded had been challenged and invalidated in the Section 251 Decision.

Section 271 addresses a matter that States have never had jurisdiction to determine: whether and under what conditions BOCs will be allowed to provide long distance services that are overwhelmingly interstate. As is set forth *supra*, prior to the 1996 Act, BOCs were barred from providing such services under the MFJ and § 214 of the Communications Act. In § 271(a) of the 1996 Act, Congress codified the MFJ's long distance restrictions by prohibiting BOCs with local exchange monopolies from selling long distance services to their local exchange customers.

The 1996 Act provides that the FCC may grant long distance authority to a BOC if it makes certain findings, two of which are pertinent here. First, it must find that the BOC provides access and interconnection "in accordance with the [pricing] requirements of sections 251(c)[] and 252(d)[]." *See* 47 U.S.C. § 271(c)(2)(B). In addition, it must determine whether a BOC's long distance entry would harm long distance competition and be contrary to the "public interest." *See* 47 U.S.C. § 271(d)(3)(C). Each of these determinations is expressly and exclusively assigned to the FCC. See § 271(d)(3) ("The Commission shall not approve the authorization requested in an application . . . unless it finds that" these statutory requirements have been satisfied (emphasis added)). The FCC's conclusion that this provision requires it to make its own findings that the BOC has complied with the Act's pricing standards and is not charging prices that would render its entry into the long distance market contrary to the public interest is thus compelled by the plain language of the Act.[5]

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[5] That conclusion is in any event a reasonable one. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984); *Mississippi Power & Light*

(continued...)

The Eighth Circuit, however, did not understand § 271(d)(3) to require the FCC to make its own finding whether the prices satisfy the statutory standards. The Eighth Circuit instead concluded that the checklist does "nothing more than incorporate by reference" the pricing requirements of §§ 251 and 252, which that court had previously held were to be interpreted by the States, without regard to FCC regulations, when interconnection agreements are arbitrated. App. 10a. Under the Eighth Circuit's view, § 271(d)(3) therefore requires only that the FCC confirm with the state commission that the BOC is actually charging whatever prices the state commission has approved. Similarly, the D.C. Circuit's only role in reviewing the FCC's approval of a § 271 application is to see if the FCC actually checked with the State.

The Eighth Circuit's reading of § 271 is inconsistent with its terms. Section 271 does not merely incorporate § 252 by reference, but also contains the unambiguous grant of authority to the FCC that the Eighth Circuit's Section 251 Decision (erroneously) found lacking with respect to arbitration of interconnection agreements. As noted, § 271 requires the FCC itself to "find" whether a BOC has opened the local exchange market to competition by, *inter alia*, providing access to facilities and services at prices that comply with the statutory standards in §§ 251 and 252. Section 271 contemplates that the FCC will "consult" with state commissions to "verify" BOC compliance with the statutory requirements, including proper pricing. *See* § 271(d)(2)(B). But § 271 makes clear that while

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[5] (...continued)
Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 380-81 (1988) (Scalia, J., concurring in the judgment) (an agency's determination of the scope of its authority is entitled to *Chevron* deference).

the FCC is required to give substantial deference to the views of the Justice Department, it is *not* required to give any particular deference to state commission determinations in § 271 proceedings. *Compare* § 271(d)(2)(A) (requiring the FCC to give "substantial weight" to the Department of Justice's recommendation on § 271 applications) *with* § 271(d)(2)(B) (omitting any requirement that the FCC give any specified weight to state determinations). Indeed, it would be impossible for the FCC to give "substantial weight" to the Justice Department's recommendations if it were simultaneously required to treat state determinations on particular checklist items as conclusive.[6]

The Eighth Circuit apparently thought it would be anomalous to hold that a State may adopt rules relating to local services that it thinks sufficient to enable a BOC to enter the long distance market without significant risk of competitive harm and that the FCC could nonetheless disagree and decline to authorize such entry. But that is precisely the situation that applied under the MFJ, on which § 271 was modeled, when the federal courts acting under the Sherman Act were required to

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[6] Notably, the language of § 271 in requiring an FCC finding of compliance is virtually identical to the language of the provision authorizing federal district courts to review state commission arbitration decisions. *Compare* § 271(c)(2)(B)(ii) (FCC must find that BOC is offering access to network elements "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)") *with* § 252(e)(6) (federal district courts must determine whether the state commission's determination "meets the requirements of section 251 and . . . section [252]"). Neither the Eighth Circuit nor any party has ever suggested, however, that Section 252(e)(6) requires federal district courts to treat state determinations as conclusive.

assess whether state regulation was sufficient to justify BOC long distance entry. *See supra* pp. 8-9.

No FCC deference to state commission interpretations of the Act's pricing requirements could feasibly be given in any event. The 50 state commissions will undoubtedly interpret the Act differently in some respects. As the FCC observed in the *Ameritech Order*, however, federal statutes are presumed to have a uniform meaning, and there ultimately can be only one definition, not multiple definitions, of the statutory requirement that prices be cost-based. ¶ 286 (App. 26a). Under the Eighth Circuit's Section 251 Decision, that uniform definition will emerge as federal district courts review the state commission interpretations of the pricing requirements, and as those district court decisions are then reviewed by courts of appeals and potentially this Court -- a process that will take considerable time. In the meantime, the FCC is required to apply its best interpretation of those provisions when it acts within its authority under § 271, just as the States must apply their best interpretations in acting within what the Eighth Circuit held to be their sphere of authority in establishing interconnection agreements. And because the FCC interpretation, just like the States' interpretations, is subject to judicial review, the definitive meaning of these provisions will still ultimately be resolved by the courts (rather than by either federal or state administrative agencies).

The Eighth Circuit's contrary view would lead to absurd results. There would be no uniformity in the FCC's application of § 271's entry test, because the FCC would be required to treat each state commission's interpretation of § 252's pricing standards as conclusive for that State, regardless of how that interpretation might differ from other state commission interpretations in States for which other § 271 applications are pending. Further, every time a federal district court reversed a

state commission's pricing determination, a BOC that had received long distance authority could have that authority revoked for then failing to meet the checklist. *See* § 271(d)(6) (FCC revocation authority "[i]f at any time after the approval of an application . . . the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval").

Thus, the Eighth Circuit was simply wrong in concluding that an FCC interpretation of the statutory pricing requirements in the course of deciding § 271 applications is inconsistent with the authority over pricing that it had previously held belonged to state commissions under §§ 251 and 252. Both state and FCC interpretations of the statutory pricing standards will be reviewed by the courts, which will establish the definitive meaning of the statute. Moreover, even in the meantime, an FCC decision rejecting a long distance application on the ground that a BOC's prices do not satisfy the requirements of § 251(c) or 252(d) would have no effect on the BOC's ability to continue to charge those same prices or on the State's pricing determinations. It would simply preclude the BOC from providing long distance services, a decision § 271 expressly empowers the FCC to make.

Furthermore, even apart from the FCC's responsibility to make independent findings of checklist compliance, § 271 separately requires the FCC broadly to determine whether the grant of a BOC's application would be contrary to the "public interest." *See* 47 U.S.C. § 271(d)(3)(C). As the FCC has found, the pricing of BOC facilities and services has "profound implications" for "competition in the long distance market." App. 27a (¶ 287). This Court has held that competitive considerations are one of the required elements of any public

interest inquiry,[7] and the Act thus not only permits, but requires, the FCC to consider whether a BOC's entry would harm competition in the long distance market. But under the Eighth Circuit's view, essential aspects of the FCC's public interest determination are ceded to the States, and the FCC is thus precluded from rejecting a BOC application *even if* it concludes that the BOC is charging prices for interconnection, network elements, and resale that will preclude competitive entry and thus enable the BOC both to maintain its local monopoly and to leverage that monopoly into the long distance market so as to harm long distance consumers. That result finds no support in the Act, and would defeat its central objectives.

II. THIS CASE SHOULD BE CONSIDERED TOGETHER WITH THE OTHER *IOWA UTILITIES BOARD* DECISIONS ON WHICH CERTIORARI HAS ALREADY BEEN GRANTED.

The Section 271 Decision should be reviewed and considered together with the Section 251 Decision on which certiorari has already been granted. Even if the Court affirms the Section 251 Decision, the Eighth Circuit's extension of that holding to limit the FCC's § 271 authority over interstate markets will remain both unwarranted as a matter of law and profoundly disruptive to the continued implementation of

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[7] *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) ("[t]here can be no doubt that competition is a relevant factor in weighing the public interest" under the Communications Act); *Denver & Rio Grande W. R.R. v. United States*, 387 U.S. 485, 492 (1967) ("this Court ha[s] read terms such as 'public interest' broadly, to require consideration of all important consequences including anticompetitive effects").

central provisions of the 1996 Act. Considerations of practicality and efficiency militate strongly in favor of simultaneous review of both decisions.

If the two decisions are not reviewed at the same time, that will create extraordinary difficulties for the FCC and the industry in the interim. Numerous § 271 applications will be filed by the BOCs over the course of the next 12 months. Because Congress wished to ensure expedited FCC decisionmaking on § 271 matters, the FCC is statutorily required to issue a final decision on each § 271 application within 90 days of its filing. *See* § 271(d)(3). The four BOC applications that have been filed to date have each been rejected for deficiencies unrelated to pricing,[8] and in light of the market conditions that currently prevail, BOC applications in the very near future are similarly unlikely to be held to satisfy the non-pricing requirements of the Act. However, that may well

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[8] *See Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Oklahoma*, 12 F.C.C.R. 8685 (1997); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-region InterLATA Services in Michigan*, CC Docket No. 97-137 (Aug. 19, 1997); *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, 1997 W.L. 799081, CC Docket No. 97-208 (FCC Dec. 24, 1997); *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, 1998 W.L. 42491, CC Docket No. 97-231 (FCC Feb. 4, 1998).

change by early 1999 and pricing issues could then become dispositive. As a result, if the Section 271 Decision is not considered together with the Section 251 Decision, the § 271 issue may nonetheless have to be considered by the Court, and provisionally decided, in the rushed and abbreviated context of emergency stay requests.[9] This Court's interest in orderly decisionmaking would not be best served by such a process.

By contrast, consideration of the § 271 and § 251 issues at the same time will substantially aid the Court in its consideration of each. The two decisions arise from a single case, and the court of appeals viewed those decisions as so interrelated that it believed its holding in one conclusively dictated the outcome of the other. In the Eighth Circuit's view, the Section 271 Decision merely implemented its Section 251 Decision.

That the parties have been forced to file two separate petitions rather than one is purely an accident of timing. The Eighth Circuit had the mandamus matter under consideration for five months before it issued the writ on January 22, 1998. The urgency of resolving the issues raised in the Section 251 Decision required petitioners to file in November 1997 their petitions for certiorari covering the Eighth Circuit's initial decision (issued on July 18, 1997) and its decision on rehearing

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[9] Such requests could take the form of motions to this Court by the undersigned petitioners to stay the Eighth Circuit's Section 271 Decision. In addition, other petitioners might file motions in the D.C. Circuit seeking to stay any decision by the FCC that granted an application but failed to consider pricing. And whether such a stay were granted or denied by the D.C. Circuit, the losing party would be nearly certain to seek emergency relief from this Court.

(issued on October 14, 1998).[10] Had the mandamus decision issued sooner, petitioners could and would have sought certiorari on the entire case in a single petition, and there is no reason to believe the Court would have held the § 271 issue while granting certiorari on all remaining issues. Given that the § 271 issue can still be fully briefed in time to be argued together with review of the Section 251 Decision, this accident of timing need not and should not influence the Court's decision on how it can most efficiently structure its consideration of *Iowa Utilities Board*.

That is especially the case in light of the fact that the § 271 issue will necessarily be before the Court in some form in its review of the Section 251 Decision even if this petition is held. In particular, regardless of whether this case is granted now, petitioners' merits brief in the § 251 case will directly address § 271 and the Eighth Circuit's mandamus decision because they graphically illustrate one of the reasons why the Eighth Circuit's Section 251 Decision was wrong. And because the Court will therefore be considering the § 271 issues in any event when it considers the Section 251 Decision, it will add no significant additional complexity or burden to the case if the two Eighth Circuit decisions are considered together.

Specifically, petitioners will argue that it would be extraordinary to conclude that the FCC, which is charged with deciding BOC applications to provide long distance service through the application of both detailed checklist requirements that expressly include pricing and a separate and broad "public interest" standard, has been divested by Congress of any

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[10] Indeed, the time for petitioning for certiorari on the earlier *Iowa Utilities Board* decisions had expired by the time the Section 271 Decision issued.

obligation or ability, when exercising that responsibility, to consider the prices BOCs charge for access to their monopoly facilities. Under that view, the FCC could be required to permit BOC entry into the long distance market even if it determined that the BOC's prices would completely foreclose competition with its local monopoly and enable it to leverage that monopoly to gain anticompetitive advantages, and harm consumers, in the long distance market.

But the Eighth Circuit felt driven to that unnatural result because it believed that any other outcome would be irreconcilable with the core holding of its Section 251 Decision. While we believe that the FCC's authority under § 271 can and should be upheld regardless of what the Court determines about the FCC's authority under § 251, that § 271 authority is also powerful evidence that Congress could not have believed, as the Eighth Circuit held, that §§ 251 and 252 deprived the FCC of the power to issue federal pricing standards that would bind state commissions fashioning interconnection agreements. In particular, we will argue, because the FCC will in any event have to construe the federal pricing requirements in implementing § 271, it is highly unlikely that Congress would have precluded it from construing the same requirements when issuing regulations under § 251.

The BOCs and state commissions, of course, take the opposite position. In accord with the Eighth Circuit, they contend that the decision that the FCC has no pricing jurisdiction under § 251 necessarily dictates that the FCC cannot interpret the federal statutory pricing requirements even when applying § 271 to regulate entry into interstate markets. But even if that were so, it would only underscore the importance of addressing the Section 251 Decision and the Section 271 Decision together, so that the Court will have

before it concretely, and thus be able to consider, all necessary implications of any decision it reaches on § 251.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and this case should be reviewed together with the *Iowa Utilities Board* cases already granted.

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